(2)

91-393

No. _____

In The

Supreme Court Of The United States

October Term, 1991

L. MICHAEL MAJESKE
Petitioner

v.

BOARD OF TRUSTEES FOR
REGIONAL COMMUNITY COLLEGES
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD BLUMENTHAL
ATTORNEY GENERAL

BERNARD F. MCGOVERN, JR.
Assistant Attorney General

JOHN R. WHELAN*
Assistant Attorney General

CARROLL T. WILLIS, JR.
Assistant Attorney General
MacKenzie Hall
110 Sherman Street
Hartford, CT 06105
Tel: (203) 566-7173

*Counsel of Record

Printed by
Brunie's Printing Services, Inc.
90 Connecticut Boulevard
East Hartford, CT 06108
528-4164

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

Cases **Page(s)**

Statutes

Federal Rules of Civil Procedure

Local Rules of Civil Procedure

No. _____

In The

Supreme Court Of The United States

October Term, 1991

L. MICHAEL MAJESKE
Petitioner

v.

BOARD OF TRUSTEES FOR
REGIONAL COMMUNITY COLLEGES
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF
In Opposition To Petition For A Writ of Certiorari

STATEMENT OF THE CASE

A. Nature and Course Of The Proceedings

On August 31, 1989, the petitioner filed this action against his employer, the Board of Trustees For Regional Community Colleges under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a) and 29 U.S.C. § 630(b) and the Age Discrimination Claims Assistance Act of 1988.

The petitioner is currently an assistant professor at Greater Hartford Community College ("GHCC"). He was hired as an instructor in 1969 and has been an assistant professor since 1974.

The petitioner alleged that he had been denied promotion in 1985 on the basis of performance evaluations which were purportedly biased against him in order to justify non-selection for promotion to professor.

The plaintiff sought monetary damages, retroactive promotion, back pay and adjustments for his retirement. On November 19, 1990, respondent filed a Motion for Summary Judgment.

By Endorsement Ruling filed on December 14, 1990, the District Court (Cabranes, J.) granted the respondent's motion.

On January 10, 1991, petitioner filed Notice of Appeal dated January 8, 1991 to the United States Court of Appeals for the Second Circuit. By summary order on May 15, 1991, the Court of Appeals affirmed the District Court's ruling.

The petitioner filed a Motion for Reconsideration dated May 30, 1991, which the Court of Appeals denied on June 10, 1991.

B. Statement Of Relevant Facts

The defendant board moved for summary judgment on the basis of the following undisputed facts. No counterstatement of facts was ever submitted by petitioner. Therefore, under Rule 9 of the Local Rules of Civil Procedure, the facts were deemed admitted by the petitioner.[1] The undisputed

[1] Rule 9(c)1 of the Local Rules of Civil Procedure provides: "All material facts set forth in said statement will be deemed admitted unless controverted by the statement required to be served by the opposing party in accordance with Rule 9(c)2."

facts were before the District Court and the Court of Appeals on the defendant's Motion for Summary Judgment which was granted below.[2]

The petitioner, Leonard Michael Majeske, is a member of the Instructional Faculty at GHCC, which is a regional community college administered by the defendant Board of Trustees for Regional Community Colleges ("the defendant board"). Statement of Undisputed Facts ("Statement"), par. 1. (App. at 1A).[3]

The faculty ranks for instructional faculty at GHCC are instructor, assistant professor, associate professor and professor. Statement, par. 2. (App. at 1A.)

The petitioner filed Complaint Number 8640141 dated October 16, 1985 with the State of Connecticut Commission on Human Rights and Opportunities ("the CHRO"). The complaint alleged that the defendant board denied him a promotion at GHCC to professor on or about June 3, 1985. Statement, par. 3. (App. at 1A.)

On April 10, 1986, the CHRO notified the petitioner by letter that his complaint had been dismissed for lack of evidence. Statement, par. 4. (App. at 1A.)

On October 9, 1986, the CHRO notified the petitioner by letter that his complaint had been reconsidered at his request and that the original findings and dismissal had been confirmed. Statement, par. 5. (App. at 2A.)

On October 27, 1986, the Equal Employment Opportunity Commission ("the EEOC") notified the petitioner by letter that it had received from the CHRO and filed a copy of

---

[2] The defendant-appellee's (respondent's) statement of undisputed facts are found at pages 38-41 of the defendant-appellee's appendix before the Court of Appeals, which is printed herein as Appendix (A).

[3] All references are to pages in the respondent's Appendix to this brief.

the complaint. The letter also indicated that EEOC planned no action concerning the petitioner's charge under the federal Age Discrimination In Employment Act ("ADEA") 29 U.S.C. § 621 *et seq.*, but that the receipt and filing of his charge by the EEOC preserved his private suit rights. In addition, the petitioner was notified that in order to file a private suit, he must do so within two years of the date of the alleged discriminatory action or within three years in case of a willful violation. Statement, par. 6. (App. at 2A.)

On April 8, 1987, the petitioner filed a complaint dated March 17, 1987 in the District Court and named as defendants, the board, GHCC, Conrad Mallett, current GHCC president, and former GHCC president Arthur Banks. The action was brought under the ADEA and alleged that the petitioner had been denied a promotion to the position of professor. Statement, par. 7 (App. at 2A.) The District Court dismissed the action by order dated July 13, 1987 and filed on July 14, 1987, pursuant to Rule 41(b), Federal Rules of Civil Procedure. The petitioner filed a Motion to Reopen and To Amend Complaint on May 31, 1988 in the United States District Court. The named defendants were Andrew McKirdy, Executive Director of the defendant board, and Sidney Lipshires, President Congress of Connecticut Community Colleges, the petitioner's collective bargaining representative.

The motion was denied in an *Endorsement Ruling* by the Court dated June 21, 1988 and filed on June 22, 1988.

Thereafter, the petitioner filed an appeal against the defendant board on August 31, 1989.

The District Court granted the motion and entered judgment for the defendant board on the statute of limitations and *res judicata* grounds.

The Court of Appeals affirmed the District Court's ruling on May 15, 1991.

The petitioner filed a Motion for Reconsideration dated

May 30, 1991 and the Court of Appeals denied the motion on June 10, 1991.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS NEITHER CONFLICTS WITH DECISION OF OTHER FEDERAL APPELLATE COURTS NOR DEPARTS SO FAR FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS SO AS TO WARRANT THIS COURT'S EXERCISE OF ITS SUPERVISORY POWERS

As demonstrated below, the issues relating to the statute of limitations and *res judicata* have been thoroughly addressed by the courts. There is no important dispute about their application. The petitioner has not alleged any conflict among the Federal appellate courts concerning the matters raised in his petition for certiorari.

Finally, petitioner has failed to suggest any factual basis for the proposition that the Court of Appeals for the Second Circuit either departed from the accepted and usual course of judicial proceedings, or sanctioned such departure by the District Court. Petitioner's bald assertion that a case is not given, in the petitioner's estimation, all the consideration and reflection it merits is hardly a sufficient rationale for granting a petition for a writ of certiorari. In any event, as the respondent will show below, all issues raised by the petitioner were disposed of by the Court of Appeals on the basis of established precedent, obviating the need for the court's review of any issues raised by the petitioner.

II. THE COURT OF APPEALS PROPERLY AFFIRMED SUMMARY JUDGMENT IN RESPONDENT'S FAVOR ON THE GROUND OF THE STATUTE OF LIMITATIONS

The ADEA does not contain its own statute of limitations; rather, 29 U.S.C. § 626(e)(1) provides that 29 U.S.C. § 255 shall apply to ADEA actions. In turn, § 255 provides in pertinent part:

> Any action . . . to enforce any cause of action . . .
>
> (a) . . . may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced with two years after the cause of action occurred except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.

29 U. S. C. 255 (1982).

The period runs from the time the employer takes the allegedly discriminatory action and communicates it to the employee. *See Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980). The period ends when the employee "commences" his action. 29 U.S.C. § 255. If the employee brings an individual action, as in the instant case, commencement occurred when the employee files his complaint. 29 U.S.C. § 256(a). In the case at bar, the statute of limitations began to run on the date that the alleged discriminatory action occurred, June 5, 1985. Petitioner filed his complaint in this cause of action on August 31, 1989, more than four years later.

Petitioner claims that the District Court erred when, in the course of its ruling, it failed to find that the statute of limitations does not apply to ongoing or continuous violations.

In order to show that there is a continuing violation, the petitioner must establish that several incidents of discrimination against petitioner constitute "'a series of related acts' or that defendant's actions were taken pursuant to 'the maintenance of a discriminatory system both before and during the [limitation] period.'" *LaBeach v. Nestle Co., Inc.* 658

F.Supp. 676, 686 (S.D.N.Y. 1987) (quoting *Valentino v. United States Postal Serv.*, 674 F.2d 56, 65 (D.C. Cir. 1982).

When a petitioner claims that acts of discrimination constitute a series of related acts, "it must be clear that the acts complained of are not completed, distinct occurrences." *Yokum v. St. Johnsbury Trucking Co.*, 595 F.Supp. 1532, 1534 (D. Conn. 1984). Discrete violations of different character and time do not necessarily fit into a pattern of continuing violation and "[m]ere continuity of employment without more, is insufficient to prolong the life of a cause of action for employment discrimination." *Delaware State College v. Ricks, supra*, at 257.

In the instant case, the alleged denial of a promotion to the petitioner was unquestionably a discrete and complete act. The acts complained of by the petitioner were completed, distinct occurrences.

With regard to the issue of the maintenance of a discriminatory system, petitioner has not provided any facts to satisfy his burden of showing that the respondent adopted any continuous policy of discrimination; rather his allegations of a continuing course of conduct are all conclusory. In order to establish that respondent engaged in a continuing violation, petitioner must produce competent evidence of a "continuous practice and policy of discrimination." *Miller v. International Tel. and Tel. Corp.*, 755 F.2d 20, 25 (2d Cir.) (citations omitted), cert. denied, 474 U.S. 851 (1985).

The continuing policy theory has been applied where an on-going system is found. *See Guardians Ass'n. v. Civil Serv. Comm'n*, 633 F.2d 232 (2d Cir. 1980) (refusals to hire based on discriminatory test). In cases such as *Guardians*, the violations are pervasive and continue to the time the action was brought as the defendant employer continues to utilize the results of discriminatory process as a basis of personnel decisions over a period of time. *See Guardians, supra* at 249. Once the continuing violation ceases or once employees are no longer subject to the discriminatory policy or actions, the fil-

ing limitations period commences. *EEOC v. Home Ins.*, 553 F.Supp. at 704, 713 (1982).

In contrast, the petitioner, in this action, is complaining of the employer's decision of non-promotion.

Instead of viewing the denial of promotions as completed occurrences which trigger the running of the limitations period, the petitioner characterizes the denial of promotions as a continuing policy of discrimination.

Decisions not to promote are separate occurrences of discrimination, and the filing limitations period begins to run when the decisions are made and communicated to petitioners. *Delaware State College v. Ricks, supra* 498; *Chardon v. Fernandez*, 454 U.S. 6 (1981); *Pfister v. Allied Corp.*, 539 F.Supp. 224 (S.D.N.Y. 1982). In the case at bar, the petitioner has not shown that he was not aware of the respondent's board's June, 1985 decision, nor has he shown that this decision was not communicated to him.[4]

Standing alone, the evidence of individual and discrete incidents of discrimination is inadequate to support a claim that there has been a pattern and practice of discrimination. *See Haskell v. Kaman Corp.*, 743 F.2d 113, 121 (2d Cir. 1984); *Ste. Marie v. Eastern R.R. Ass'n.*, 650 F.2d 395, 405 (2d Cir. 1981).

From the undisputed facts set forth above, it is clear that the petitioner's cause of action occurred in June, 1985, and this action was filed on August 31, 1989, well after the expiration of any limitation period contained in 29 U.S.C. § 255.

---

[4] There can be no dispute that by October, 1985, the petitioner was aware of the non-promotion decision because the CHRO complaint alleging discrimination in his non-promotion is dated October 16, 1985. Statement, par. 3. (App. at 1A.)

III. THE COURT OF APPEALS PROPERLY AFFIRMED SUMMARY JUDGMENT IN RESPONDENT'S FAVOR ON THE GROUNDS THAT PETITIONER'S COMPLAINT IS BARRED BY THE DOCTRINE OF *RES JUDICATA*

Petitioner claims that the Court of Appeals erred in affirming the District Court, when in the course of its ruling, it found this action to be substantially identical to one dismissed in 1987 by Judge Nevas and that accordingly, it would be barred by the doctrine of *res judicata*.

In the *Order* issued by Judge Nevas, the case was dismissed pursuant to Rule 41(b), Fed. R. Civ.P., which provides in pertinent part:

> **(b) Involuntary Dismissal: Effect Thereof** . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Judge Nevas dismissed the prior action for failure to prosecute. Respondent does not cite language which specifies that the order for dismissal does not operate as an adjudication upon the merits, nor should it because the dismissal was for failure to prosecute and not for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19. Therefore, Judge Nevas' order of dismissal operates as an adjudication upon the merits by virtue of Rule 41(b).

The petitioner's only claim in opposition to the application of the doctrine of *res judicata* is that *res judicata* should not apply because the court did not rule on the merits of his earlier suit. However, Rule 41(b) Fed. R. Civ. P. makes it clear that *res judicata* applies to dismissals for failure to prosecute with due diligence. *Lyell Theatre Corp. v. Loews Corp.*, 682 F.2d 37 (1982).

IV. THE COURT OF APPEALS' AFFIRMANCE OF SUMMARY JUDGMENT RULING DOES NOT VIOLATE PETITIONER'S SEVENTH AMENDMENT RIGHT TO A JURY TRIAL.

It is textbook law that Seventh Amendment rights are not infringed by the grant of a motion for summary judgment, since, in such circumstances, the jury as trier of fact has no role. *Barrett v. Independent Order of Foresters*, 625 F.2d 73 (1980), *Shore v. Parklane Hosiery Co., Inc.*, 565 F.2d 815 (1977), cert. granted, 435 U.S. 1006, aff'd 439 U.S. 322 (1979); *Barber v. Kimbrell's, Inc.*, 577 F.2d 216 (1978) cert. denied, 433 U.S. 934 (1978); *Davis v. U. S. Government*, 742 F.2d 171 (1984).

For all of the reasons described above, summary judgment was properly entered upon well established precedents of this Court. The plaintiff has not demonstrated any conflict between the circuits on any material issue of law nor has he raised any issue which needs an original decision or revisitation by the Court.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for writ of certiorari.

FOR THE RESPONDENT,
BOARD OF TRUSTEES FOR
REGIONAL COMMUNITY COLLEGES

RICHARD BLUMENTHAL
ATTORNEY GENERAL,
STATE OF CONNECTICUT

BERNARD F. McGOVERN, JR.
Assistant Attorney General

JOHN R. WHELAN*
Assistant Attorney General
MacKenzie Hall
110 Sherman Street
Hartford, CT 06105
Tel. (203) 566-7173

CARROLL T. WILLIS, JR.
Assistant Attorney General
MacKenzie Hall
110 Sherman Street
Hartford, CT 06105
Tel. (203) 566-7173

*Counsel of Record

No. _____

In The

Supreme Court Of The United States

October Term, 1991

L. MICHAEL MAJESKE

Petitioner

v.

BOARD OF TRUSTEES FOR
REGIONAL COMMUNITY COLLEGES

Respondent

APPENDIX TO BRIEF OF RESPONDENT

TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LEONARD MICHAEL MAJESKE *Plaintiff*	CIVIL ACTION NO. H-89-491 (JAC)
v.	
BOARD OF TRUSTEES FOR REGIONAL COMMUNITY COLLEGES *Defendant*	NOVEMBER 19, 1990

STATEMENT OF UNDISPUTED FACTS NOT IN DISPUTE

Pursuant to Local Rule 9(c) the defendant submits the following statement of material facts as to which the defendants contend there is no genuine issue to be tried.

1. The plaintiff, Leonard Michael Majeske is a member of the Instructional Faculty at Greater Hartford Community College, which is a regional community college administered by the Board of Trustees for Regional Community Colleges.

2. The faculty ranks for Instructional Faculty at Greater Hartford Community College are Instructor, Assistant Professor, Associate Professor and Professor.

3. The plaintiff filed Complaint Number 8640141 dated October 16, 1985 with the State of Connecticut Commission on Human Rights and Opportunities. The Complaint alleged that the State of Connecticut Board of Trustees for Regional Community Colleges at Greater Hartford Community Colleges denied him a promotion to professor on or about June 3, 1985.

4. On April 10, 1986, the State of Connecticut Commission on Human Rights and Opportunities notified the plaintiff by letter that Complaint Number 8640141 dated October 16, 1985 had been closed.

5. On October 9, 1986, the State of Connecticut Commission on Human Rights and Opportunities notified the plaintiff by letter that Complaint Number 864014 had been reconsidered at his request and that the original findings and closure recommendations had been confirmed. Complaint Number 8640141 had been dismissed for lack of sufficient evidence.

6. On October 27, 1986, the Equal Employment Opportunity Commission notified the plaintiff by letter that it had received and filed a copy of Complaint Number 8640141 dated October 16, 1985 and filed with the Connecticut Commission on Human Rights and Opportunities. The letter also indicated that EEOC planned no action concerning plaintiff's charge under the federal Age Discrimination In Employment Act. The plaintiff was further informed that the receipt and filing of his charge by the EEOC preserved his private suit rights. In addition, plaintiff was notified that in order to file a private suit, he must do so within two years of the date of the alleged discriminatory action or within three years in case of a willful violation.

7. On April 8, 1987, the plaintiff filed a complaint dated March 17, 1987 in the United States District Court and named as defendants, the Board of Trustees, Greater Hartford Community College, Conrad Mallett and Arthur Banks. The action was brought under the Age Discrimination In Employment Act of 1967 and alleged that the plaintiff had been denied a promotion to the position of professor.

8. The plaintiff's cause of action filed in United States District Court on April 8, 1987 was dismissed by the Court by order dated July 13, 1987 and filed July 14, 1987, pursuant to Rule 41(b), Federal Rules of Civil Procedure.

9. The plaintiff filed a Motion to Reopen and To Amend Complaint on May 31, 1988 in the United States District Court. The named defendants were Andrew McKirdy, Executive Director Board of Trustees of Regional Community col-

leges and Sidney Lipshires, President Congress of Connecticut Community Colleges.

10. The plaintiff's Motion to Reopen and To Amend Complaint filed May 31, 1988 was denied in an *Endorsement Ruling* by the Court dated June 21, 1988 and filed on June 22, 1988.

11. The plaintiff filed this present action against the defendant, Board of Trustees for Regional Community Colleges on August 31, 1989.

BOARD OF TRUSTEES FOR
REGIONAL COMMUNITY COLLEGES

BY: CLARINE NARDI RIDDLE
ATTORNEY GENERAL

/s/ CARROLL T. WILLIS, JR.
Assistant Attorney General
MacKenzie Hall
110 Sherman Street
Hartford, CT 06105
Tel: 566-3696